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No. 01-1735

IN THE

Supreme Court of the United States

TOM EASTON and ELENA EASTON,
and as successors in interest of decedent
MARGARETHA MARY WINCHESTER,

Petitioners,

v.

JIM MAREADY, DEL NORTE SHERIFF;
DEPUTY SHERIFF THOMAS HOCKABOUT;
DEPUTY SHERIFF GERALD HARWOOD;
DEPUTY SHERIFF GARTH GOODRICH;
STEPHAN BROHMER, DIRECTOR DEL NORTE
ADULT PROTECTIVE SERVICES; each in their
individual and official capacity,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeal of the State of California

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. CALIFORNIA'S ELDER ABUSE ACT § 15634(b) IS FACIALLY UNCONSTITUTIONAL

A. California Absolute Immunity Exception

Should respondents prevail in this action, there will be a new and unprecedented exception in the line of Fourth Amendment jurisprudence. Let us name it the California Elder Abuse absolute immunity exception.

This new exception is quite unlike the narrow qualified immunity judicially granted to law enforcement in criminal cases involving discovery of contraband or in administrative searches and seizure such as in child abuse. This new legislative exception does not require exigent circumstances and probable cause to win qualified immunity.

It simply grants absolute immunity.

With this exception law enforcement in California need only point to a medical practitioner's orders or information that an elder or endangered adult is in some medical danger, and then no further exigent circumstance or probable cause is required. No need to knock, just enter forcibly at will, for this exception is absolute.

As in California's mentally ill involuntary commitment statute of 5150, no consent of the patient is required. California's law enforcement now no longer has its hands tied by burdensome adherence to constitutional standards. Its legislature has freed it to enter homes at will with only a medical pretext necessary.

A brave new world? Only if this Court agrees.

B. Were The Federal Questions Raised Below?

Respondents assert that the federal questions herein were not raised or addressed below, nor decided by the trial court or court of appeal [Brief:4-7].

Whether the courts below fairly addressed the violations of the Fourth Amendment and the right of a patient to refuse medical treatment does not allow respondents to recklessly argue that these issues are foreclosed from consideration by this Court.

Indeed, long ago this Court held, against similar allegations by defendants:

> " '[T]his court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' [citation omitted]." *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958).

The record in this case shows that petitioners' First Cause of Action of their complaint fairly stated the violations of the Fourth Amendment:

> "6. Contrary to common law and the laws and the Constitution of the United States, defendants . . . unlawfully without search warrant, entered . . . falsely imprisoning and seizing and removing Peggy Winchester from her bed . . . [¶] 7. . . thereby violated

plaintiffs' civil rights under the Fourth Amendment." Complaint, CT 2-3.

Petitioners' Second Cause of Action also involved the violation of the Fourth Amendment [CT 3]. In the Third Cause of Action petitioners alleged the Adult Protective Services failed to train and supervise its staff and the Sheriff's Office in the requirements of the Elder Abuse Act, in particular, its requirement of a search warrant, thus implicating the Fourth Amendment [CT 3].

Petitioners continued to raise the Fourth Amendment as their primary issue at every stage [Plaintiffs' P&A in Opposition to Defendants' Motion for Summary Judgement, CT 487-489], including in all the appellate briefs.

The California courts simply chose to ignore all of petitioners' allegations of violations in order to free law enforcement of constitutional constraints.

C. Facts Must Be Taken In Most Favorable Light To Plaintiffs To Support A Motion For Summary Judgment

If this Court finds that the California legislature could not absolutely immunize law enforcement under § 15634(b), it may then for the issue of qualified immunity determine whether the undisputed facts, taken in the light most favorable to the parties alleging injury, first show that the officers violated a constitutional right, and then whether the right was clearly established in light of the specific context of this case. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125,

1129 (2202) citing to *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

D. Exigent Circumstances Apply Only To 5150

The dilemma avoided by the courts below was how to reconcile the fact that respondents entered and seized Winchester under 5150,[1] alleging the exigent circumstance of medical emergency (but not psychiatric as required by 5150) but respondents then inconsistently asserted absolute immunity under the Elder Abuse Act.

Respondents and the California courts ignored the undisputed fact that the 911 dispatcher told the deputies to pick up Winchester on a 5150 rather than the Elder Abuse Act [CT 332:23-26].

Initially respondents' motion for summary judgment affirmatively defended only on the grounds of 5150. Later, over the objections of plaintiffs, respondents amended their motion to include the affirmative defense of absolute immunity under the Elder Abuse Act.

Respondents belatedly realized that they could never demonstrate compliance with the rigorous requirements of 5150, which requires that the person be transported only to a state approved psychiatric facility, in this case 85 miles away in Eureka, and other procedural matters never followed in this case [CT 525:7-10].

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[1] The Lanterman-Short-Petris Act, California Welfare & Institutions Code §§ 5100 et seq., is an act providing for involuntary commitment of mentally ill persons.

All of deputy Hockabout's observations (his report written down only 12 days later, and his declaration made a year and a half later], of Winchester were couched in terms of 5150's description of a mentally disordered person being gravely disabled rather than in terms of the Elder Abuse Act.

Nor was Winchester ever examined by a psychiatrist as required by 5150. Moreover, the Eureka psychiatric facility for 5150 commitments would have refused to accept Winchester had she been taken there, on the grounds that they would be overwhelmed if patients suffering from dementia or Alzheimer's were to be admitted [CT 525:1-6].

The Elder Abuse Act, at § 15701(d), explicitly precludes its use to "circumvent or supplant the involuntary detention and evaluation process" of 5150.[2]

E. Disputed and Undisputed Facts

On October 19, 1998, when nurse Morneau discovered the failure to obtain the prescription for the UTI infection, his irrational and emotional

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[2] "This chapter shall not be used to circumvent or supplant the involuntary detention and evaluation process provided for pursuant to chapter 2 (commencing with Section 5150) of Part 1 of Division 5. A person shall not be deemed an "endangered adult" for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone, in lieu of medical treatment." W & I C § 15701(d).

reaction that Winchester needed hospitalization was based in large part on the fact that it was his own fault, since he himself had on October 13 examined the discharge instruction, which had the prescription to be filled at the bottom of the page, *and failed to note it was intact and unfilled on October 13* [CT 497:25 - 498:3].

Nurse Morneau then further compounded his error by falsely alleging that Easton was refusing aid for his mother, whereas Easton was only insisting that the "easily treatable medical condition" (Respondents' own words, Brief:1] continue to be treated at home in accordance with his mother's express wishes [CT 498:4-14].

The crucial material facts, disputed and undisputed, were then as follows:

1. The sheriff's deputies were directed by 911 dispatcher to go to the home on a 5150 per the doctor's orders [CT 329]. Undisputed.

2. The deputies entered forcibly without consent [CT 498]. Undisputed.

3. Once inside with the EMT's deputy Hockabout determined that in his opinion Winchester was gravely disabled per 5150 [CT 334, 339]. *Disputed by plaintiffs' expert witness former City Police Chief Pottorff and plaintiffs* [CT 526-527; 500-501].

4. Deputy Hockabout ordered the EMTs to transport Winchester to the local hospital, *rather than to the state approved psychiatric facility 85 miles away in Eureka as was required by 5150* [CT 503-504; 479]. Undisputed.

5. Winchester refused her consent to be taken to the hospital, and once there pulled the tubes out

of her nose and thus had her arms restrained to the bed for the next 72 hours before being released to her son [CT 479]. *Undisputed except by Hock bout's declaration, which was opposed by EMT Snow, as well as plaintiffs' declarations of Hockabout 's admission that Winchester did not wish to go to hospital* [CT 503-504; 479; 498].

6. Winchester died 9 days later of functional old age [CT 480]. Undisputed.

7. Deputy Hockabout made his written report 12 days later and his declaration a year and a half later, basing both on 5150, not the Elder Abuse Act [CT 334; 339]. Undisputed.

If exigent circumstances had in fact existed, such as the alleged but unprovable medical emergency for a minor urinary tract infection (UTI), it would then have been a question for the jury, not for the court in the instant motion for summary judgment. *Wallis v. Spencer*, 202 F.3d 1126, 1138, 1141 (9th Cir. 2000).

F. Hockabout's Declaration Lacked Credibility

Deputy Hockabout did not simply "allow" [Brief:2, 10], but in fact *ordered* the EMT's to transport Winchester against her will to the local hospital, Sutter Coast Hospital in Crescent City.[3]

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[3] EMT Snow's report stated: "S.C.H. [Sutter Coast Hospital] WAS CONTACTED AND I WAS ADVISED THAT THE DR. WANTED HER [Winchester] TO BE TRANSPORTED AND S.O. [Sheriff's Office] ON SCENE SAID SHE WAS TO BE TRANSPORTED ON THEIR ORDERS ALSO." [CT 503-504].

The EMTs were merely following orders and thus were innocent parties.

Nor did deputy Hockabout ever acknowledge in his written report or his declaration that the EMTs found Winchester responsive and fully aware.

However, upon his departure Hockabout did admit to the Eastons that Winchester did not want to go to the hospital [CT 479, 498].

False details such as the alleged low blood pressure were added by Hockabout more than a year after the fact. In fact, the EMTs were unable to take Winchester's blood pressure as she refused further cooperation after refusing to go to the hospital [CT 503-504]. But as soon as arriving at the hospital her blood pressure was a normal 130/72 with a pulse of 88 [CT 564:7-11].

G. Protection of the Fourth Amendment

Respondents ignored any direct challenge to the line of administrative search cases in the Ninth Circuit, the latest being *Calabretta v. Floyd*, 189 F.3d 808, 813 (1999), following this Court's holding in *Camara v. Municipal Court*, 387 U.S. 523 (1967). These demonstrate that administrative searches and seizures must follow the requirements of the Fourth Amendment.

Respondents, as well as the court of appeal, relied upon a California case, *People v. Ray*, 21 Cal. 4th 464 (1999). This criminal case involved an open door, providing some reasonable exigent circumstance to give qualified, but not absolute, immunity to the officers.

The holding in *Ray* may be seen as a California aberration directly opposed to this Court's Fourth Amendment jurisprudence (as was noted by dissenting Judge Mosk, now deceased, referring to *Payton v. New York*, 445 U.S. 573, 575, 585 (1980)), as well as to the Ninth Circuit line of cases.

II. THE PATIENT'S BILL OF RIGHTS, AS WELL AS THE ELDER ABUSE ACT ITSELF, ALLOWS ANY VICTIM TO WITHHOLD CONSENT

Respondents assert that the issue was not raised below, but the record is clear: petitioners raised the issue of consent by alleging violation of the Fourth Amendment's prohibition against warrantless seizure of the person [CT 2-3].

Further, in the trial court petitioners also referred to the handouts of Sutter Coast's own patient bill of rights[4] and noted that they were required by the provisions of the federal Patient Self Determination Act, Public Law 101-508 [Plaintiffs' P&A in Opposition to Defendants' MSJ, CT 495:15-22].

The Elder Abuse Act itself provided that any alleged victim of elder abuse may refuse or withdraw consent [§ 15636(a), cited in Petition for Certiorari at 6]; but that cannot make § 15634(b) thereby constitutional, as respondents assert.

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[4] The Sutter Coast Hospital to which Winchester was taken had the week before provided her with a written statement of her right to refuse:

> "You can say no to any treatment you don't want - - even if the treatment will keep you alive longer." CT 506.

III. CONCLUSION

All elders in California are still in jeopardy of being arbitrarily seized, even out of their own homes, and forced into unwanted medical treatment at the whim of any law enforcement officer, in violation of the Fourth Amendment and 42 U.S.C. § 1395cc(f)(1)(A)(i).

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement!" [Attributed to Pitt, 1763]. *Miller v. United States*, 357 U.S. 301, 307 (1958)

Petitioners request that this Court grant this Petition for Writ of Certiorari to the California Court of Appeal.

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Respectfully submitted,

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